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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214449
Party	Plaintiff Omega SA (Omega AG) (Omega Ltd.)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark:     AΩE  
Opp. No.: 91214449 (Parent)  
Serial No.: 85855823

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark:     ALPHA OMEGA EPSILON  
Opp. No.: 91214454 (Child)  
Serial No.: 85855839

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark:     ALPHA OMEGA EPSILON &  
           Design  
Opp. No.: 91214452 (Child)  
Serial No.: 85857062

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark:     ALPHA OMEGA EPSILON  
Opp. No.: 91214453 (Child)  
Serial No.: 85857065

**OPPOSER'S RULE 56(D) MOTION SEEKING DISCOVERY FROM APPLICANT**

Opposer, Omega S.A. (Omega AG) (Omega Ltd.) (hereafter, "Omega" or "Opposer"),  
pursuant to Fed. R. Civ. P. 56(d) and 37 C.F.R. § 2.127(e)(1), hereby respectfully moves the

Trademark Trial and Appeal Board for an Order granting Opposer the opportunity to take discovery relevant to Applicant's Motion for Summary Judgment and then, if necessary, adjudicating Alpha Omega Epsilon, Inc.'s ("Applicant") Motion for Summary Judgment ("Applicant's Motion"; D.E. 7). Applicant will not be prejudiced by this request, given that the discovery sought was known to Applicant and outstanding at the time of Applicant's filing and also given the fact that the discovery period in this matter has not yet expired.

Like the Federal Courts, the Board has "broad discretion in determining trial and motion schedules." *U.S. v. Ajemian*, 878 F. Supp. 2d 432, 439 (S.D.N.Y. 2012) (citing *U.S. v. Bein*, 728 F. 2d 107, 114 (2d Cir. 1984)), just as they have "the power ... to control the disposition of the causes on its own docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); accord, e.g., *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96 (2d Cir. 2012) (quoting *Landis*). This sequencing is further supported by Fed. R. Civ. P. 56(d).

Opposer submits that the aforementioned discovery is necessary to allow Opposer to investigate material facts and oppose Applicant's Motion.

## **I. INTRODUCTION**

Opposer requires discovery from Applicant in order to respond to Applicant's Motion for Summary Judgment. Specifically, Opposer seeks an order permitting it to take the depositions of a representative of Applicant and of Ms. Wampler, Mr. Smiley, Mr. Shaver and Ms. Miraglia (referred to collectively as the "Declarants") relating to their declarations and corresponding exhibits filed in support of Applicant's Motion for Summary Judgment. Opposer further seeks Applicant's responses to Opposer's First Set of Interrogatories. The information Opposer requires is not public information but is within the control of the Applicant and the Declarants.

Applicant's Motion for Summary Judgment appears to be designed to evade responding to discovery. Applicant filed Summary Judgment while representing that it was working with Opposer to schedule dates for depositions (which in the case of Applicant's Rule 30(b)(6) witness was already noticed and in the case of the Declarants, subpoenas were already issued.) Applicant also refused to respond to Interrogatories, instead asserting an improper objection that the number of interrogatories exceeded the statutory limit.

## II. FACTUAL BACKGROUND

The sequence of relevant events was as follows:

1) On **January 13, 2014**, Opposer instituted these four Oppositions against Applicant Alpha Omega Epsilon, Inc.'s trademark applications for the marks, AΩE, ALPHA OMEGA EPSILON and ALPHA OMEGA EPSILON & Design. See Declaration of Oren Gelber ("Gelber Decl."), ¶ 2; D.E. 1 of Opposition Nos. 91214449, 91214454, 91214452, and 91214453. On February 17, 2014, Applicant filed its Answers to the Notices of Opposition. Gelber Decl., ¶ 3; D.E. 4 of Opposition Nos. 91214449, 91214454, 91214452, and 91214453.

2) On **March 26, 2014**, following the parties' discovery conference, Opposer moved to consolidate these four oppositions with Applicant's consent. *Id.* at ¶ 4, D.E. 5 of Opposition Nos. 91214449, 91214454, 91214452, and 91214453. The proceedings were consolidated under Opposition No. 91214449 pursuant to the Board's April 1, 2014 Order. *Id.* at ¶ 5; D.E. 6. (Hereinafter, all D.E. references will refer to the parent opposition).

3) Opposer served Applicant with its First Set of Interrogatories, First Request for Production of Documents and First Request for Admissions on **June 2, 2014**. Gelber Decl. ¶ 6 and Exhibit 1.

4) Applicant served Opposer with Applicant's Responses and Objections to Opposer's First Request for Production of Documents and Things, and Applicant's Responses and Objections to Opposer's First Request for Admissions on **July 10, 2014**. *Id.* at ¶ 7 and Exhibit 2. In addition, Applicant served Opposer with its General Objections to Opposer's First Set of Interrogatories on **July 10, 2014**. *Id.* at ¶ 8 and Exhibit 3.

5) On **July 21, 2014**, Applicant sent Opposer's counsel an email enclosing Applicant's document production bates labeled AOE 0001-0203. *Id.* at ¶ 9.

6) On **July 25, 2014**, Applicant sent Opposer's counsel multiple emails containing supplemental document production, which it asserted applied to this proceeding. *Id.* at ¶¶ 10, 11 and Exhibit 4. The document production provided on July 25, 2014 amounted to over 130 pages of additional production and included declarations from three individuals, Ms. Wampler, Mr. Smiley and Ms. Miraglia, reportedly associated with Alpha Tau Omega, Alpha Chi Omega and Chi Omega, as well as a declaration from Mr. Shaver of Affinity Marketing Consultants, Applicant's licensee. *Id.* Applicant's July 25, 2014 supplemental document production also included Internet printouts relating to Alpha Tau Omega, Alpha Chi Omega, and Chi Omega products, printouts from third party websites regarding Omega's products and copies of third party U.S. Trademark Registrations. *Id.*

7) On **August 28, 2014**, Opposer sent an email to Applicant's counsel to advise of its intent to depose Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley. Gelber Decl. ¶ 12 and Exhibit 5. Opposer inquired whether these witnesses would appear willingly. *Id.* Applicant's counsel did not respond (*Id.* at ¶ 13); accordingly, Opposer issued subpoenas for each of the Declarants on **September 3, 2014**. Gelber Decl. ¶ 15. (Opposer was able to successfully serve Ms. Wampler, Ms. Miraglia, and Mr. Smiley on **September 4 and 5, 2014**, but we were unable

to personally serve Mr. Shaver, as the address provided in his Declaration was a post office box. *Id.* at ¶ 16 and Exhibit 7.) Opposer also served upon Applicant's counsel a Notice of Deposition to Applicant pursuant to Rule 30(b)(6) on September 3, 2014. *Id.* at ¶ 14 and Exhibit 6.

8) On **September 8, 2014**, Opposer's counsel emailed Applicant's counsel to follow up regarding dates of availability for the deposition of Applicant pursuant to Rule 30(b)(6) and to confer with regard to the subpoenas issued to Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley. *Id.* at ¶ 17 and Exhibit 8. Applicant's counsel responded with an email the same day acknowledging service of the Notice of Deposition and Subpoenas and seeking to discuss dates of availability. *Id.* at ¶ 18 and Exhibit 9.

9) Late in the morning on **September 9, 2014**, Opposer's counsel received an email from Applicant's counsel enclosing a courtesy copy of Applicant's Motion for Summary Judgment as filed on September 8, 2014. *Id.* at ¶ 19 and Exhibit 10.

10) On **September 12, 2014** the Board suspended proceedings in these Oppositions due to Applicant's filing, tolling the time for response to all outstanding discovery requests. *See* D.E. 9.

Opposer requires discovery to oppose Applicant's Motion for Summary Judgment. Given the outstanding Notice of Deposition, Subpoenas and unanswered interrogatories, Opposer files this Rule 56(d) Motion and accompanying affidavit. This request is being timely filed under the Federal and Trademark Rules applicable to summary judgment and related matters.

### **III. DISCUSSION**

The sequencing of pending Motions requested by Opposer is appropriate under Rule 56(d), which provides that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Indeed, a

wealth of case law echoes this point. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (A summary judgment motion is only appropriate “after adequate time for discovery.”); *LG Electronics, Inc., v. Everex Systems*, 2000 U.S. Dist. LEXIS 20317, \*7 (4<sup>th</sup> Cir. 2000) (citing *Anderson*, 477 U.S. at 250 n. 5, (1986)) (“court should deny summary judgment when the nonmoving party has not had the opportunity to conduct discovery into matters raised in the motion.”); *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4<sup>th</sup> Cir. 1995); *Dunkin’ Donuts of America Inc. v. Metallurgical Exoproducts Corp.*, 6 USPQ2d 1026 (Fed. Cir. 1988).

In addition, while likelihood of confusion may be determined upon summary judgment, various district and circuit courts have urged the utmost caution when considering summary judgment on the fact-intensive issue of likelihood of confusion. *New Century Fin., Inc. v. New Century Fin. Corp.*, 2005 U.S. Dist. LEXIS 41192, \*7-8 (S.D. Tex. 2005); see also *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252 (9th Cir. 2001) (stating that “trial courts disfavor deciding trademark cases in summary judgments because the ultimate issue is so inherently factual . . . [and] the question of likelihood of confusion is routinely submitted for jury determination”); *Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992) (stating that “likelihood of confusion . . . has long been recognized to be a matter of varying human reactions to situations incapable of exact appraisalment”); *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 246 (2d Cir. 1983) (stating that “likelihood of confusion is frequently a fairly disputed issue of fact on which reasonable minds may differ”).

Opposer has not had the opportunity to conduct discovery into the matters raised by Applicant’s Motion. Opposer had outstanding subpoenas, discovery requests and a notice of deposition at the time of Applicant’s filing, relevant to the likelihood of confusion factors raised in Applicant’s Motion for Summary Judgment. Accordingly, Opposer asks the Board to sequence the pending Motions so as to resolve Opposer’s Motion Seeking Rule 56(d) discovery

first and deferring Applicant's Motion for Summary Judgment until Opposer has had an opportunity to obtain the necessary discovery.

**a. Opposer Requires Discovery Pursuant to Rule 56(d)<sup>1</sup>**

Timely and properly filed Rule 56(d) motions for discovery are generally granted as a matter of course. *Doe v. Abington Friends Sch.*, 480 F.3d 252, 257 (3d Cir. 2007), especially, where, as in the instant opposition, there are discovery requests outstanding. *Id.*

Courts generally require a Rule 56(d) movant to establish three things: (1) a description of the particular discovery the movant intends to seek; (2) an explanation showing how that discovery would preclude the entry of summary judgment; and (3) a statement justifying why this discovery had not been or could not have been obtained earlier. *Id.* at 255 n. 3.

**1. Description Of The Particular Discovery Applicant Is Seeking**

Opposer moves the Board for an order:

- Instructing Applicant to provide responses to Opposer's Interrogatory Nos. 2-4, 8, 9, 13, 15, 17-21, 25 and 26 (*see* Exhibit 1 to Gelber Decl.);
- Permitting Opposer to depose Applicant's representative about the facts of this matter generally, the topics provided in Schedule A to Opposer's Notice of Deposition pursuant to Rule 30(b)(6), and about the use of the Applicant's marks, the channels of trade used, the target market for the products, the sophistication of the consumers, and the sales process, Applicant's marketing efforts; and,
- Permitting Opposer to depose Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley with regard to the statements contained in their declarations, filed in support

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<sup>1</sup> The Trademark Rule pursuant to which Opposer seeks discovery, Rule 2.127(e)(1), refers to Fed. R. Civ. P. 56(f) rather than Fed. R. Civ. P. 56(d). The 2010 amendments to the Federal Rules of Civil Procedure moved the contents of what had been subdivision (f) into subdivision (d). Therefore, "the reference to Fed. R. Civ. P. 56(f) in 37 C.F.R. § 2.127(e)(1) is to be read as a reference to present Fed. R. Civ. P. 56(d)." TMBP § 528.06. *See McDonald's Corp. v. Cambridge Overseas Development Inc.*, 2013 TTAB LEXIS 75, \*2 n.3 (TTAB Mar. 22, 2013).



of Applicant's Motion for Summary Judgment.

All of the aforementioned interrogatories are directed to the issue of likelihood of confusion, specifically, the similarity or dissimilarity and nature of the goods (Nos. 2, 25); the similarity or dissimilarity of established, likely-to-continue trade channels (Nos. 13, 15); the conditions under which, and buyer to whom, sales are made, i.e. "impulse" v. careful, sophisticated purchasing (Nos. 9, 17-20); the length of time during, and the conditions under, which there has been concurrent use without evidence of actual confusion (Nos. 3, 4, 8); the variety of goods on which a mark is or is not used (Nos. 2, 25); the extent of potential confusion (Nos. 8); and other established fact probative of the effect of use. (Nos. 21, 26) Gelber Decl. at ¶ 6, Exhibit 1. Applicant raised arguments on all of these factors in its brief, and as such Opposer requires discovery to properly respond. *See generally*, D.E. 7.

The declarations of the Declarants and exhibits thereto relied on by Applicant in its Motion for Summary Judgment pertain to the following factual inquiries:

- Channels of Trade (D.E. 7 at page 10-11) (Declarations of Wampler, Miraglia and Smiley at ¶7 and Shaver at ¶ 11-12)
- Target Market (D.E. 7 at page 10) (Declarations of Wampler, Miraglia, and Smiley at ¶ 6).
- Third Party Uses of Marks and the goods that such Marks are applied to (D.E. 7 at page 10.) (Declarations of Wampler, Smiley, and Miraglia at ¶4 and Shaver at ¶ 7, 10).
- Third Party Dates of First Use (D.E. 7 at pages 8-9 and 17) (Declaration of Smiley, Wampler, and Miraglia at ¶ 8).
- Sophistication of Consumers and Conditions of Use (D.E. 7 at page 9-10)

(Declarations of Wampler, Smiley and Miraglia at ¶ 8 and Shaver at ¶¶ 5-7, and 9).

Such information directly correlates to the following *DuPont* likelihood of confusion factors:

- Factor 3 - The similarity or dissimilarity of established, likely-to-continue trade channels
- Factor 4 - The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing
- Factor 6 - The number and nature of similar marks in use on similar goods.

See D.E. 7 at page 13. Third party use, to the extent it may exist, is pertinent to dilution and the “substantially exclusive use of the mark.” *Id.* at page 18 (citing 15 U.S.C. § 1125(c)(2)(B)(iii)) and potentially the strength of the mark for the likelihood of confusion claim.

Opposer requires the aforementioned discovery in order to respond to the issues raised in Applicant’s Motion for Summary Judgment.

## 2. Information Obtained From Discovery Will Preclude The Entry Of Summary Judgment

Opposer seeks discovery regarding facts that pertain directly to the relevant likelihood of confusion factors raised in Applicant’s Motion for Summary Judgment, such as trade channels, classes of consumers, conditions of sale, concurrent use, and others. As such, Applicant’s responses to Opposer’s discovery requests and the cross-examination testimony of the Declarants related to these factors, would undoubtedly be material and could preclude the entry of summary judgment by raising triable issues of fact. Opposer has not been permitted to cross-examine the Declarants with respect to their substantive testimony or the personal knowledge that qualifies them to make such statements. The many facts alleged in Applicant’s Motion and the declarations of Mr. Shaver, Ms.

Wampler, Ms. Miraglia, and Mr. Smiley are not publicly available and would not be ascertainable without discovery from Applicant. Furthermore, these declarations are being used by Applicant as evidence pertaining to the relevant likelihood of confusion factors.

**a) Personal Knowledge and Qualification of the Declarations**

Depositions of the Declarants may uncover facts that will preclude summary judgment by raising a triable issue of fact, or discount the weight or admissibility of the evidence presented by Applicant or its Declarants. First and foremost, the Declarants' declarations do not provide a foundation to establish the qualifications of the Declarants to make the statements contained therein. There is nothing in the declarations regarding how the Declarants are knowledgeable about the statements they made or why they have such knowledge. *See John T. Clark Co. v. Colgate-Palmolive Co.*, 176 USPQ 93, 94 (TTAB 1972); TBMP § 528.05(b) (requirements for affidavits and accompanying exhibits for summary judgment motions). Similarly, there is no foundation for any of the Declarants as to their knowledge regarding the exhibits provided in association with their declarations.

For example, in the Smiley declaration, there is nothing to indicate whether Smiley has personal knowledge of the material to which he testified. As another example, there is nothing to qualify Shaver to declare that *prior* to his involvement in fraternity and sorority merchandising, a niche market for Greek letter organizations existed. *See* D.E. 7, Shaver Decl. at ¶11. The broad and unsubstantiated statements made by the Declarants should be subject to cross-examination in the form of depositions of these witnesses to determine whether they are qualified to make such statements in the first place. *See Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1046 (D.C. Cir. 2008).

If Opposer is allowed to depose the Declarants it may be revealed that they are not qualified to make some or all of the statements set forth in their Declarations. Considering that

such testimony is directed towards relevant, material likelihood of confusion factors, and heavily relied on by the Applicant, the information discovered in such a deposition could certainly preclude summary judgment.

Applicant further relies upon the Smiley and Wampler declarations to claim that third parties have used Omega (either Greek letter or word marks) as early as 1865. See D.E. 7 at page 8. Opposer is entitled to know how the Declarants claim to know such information. Opposer has the right to cross-examine Declarants as to the basis for such statements and why they believe this information to be true. Furthermore, Opposer should be permitted to cross-examine the Declarants to determine whether the alleged use was continuous, the geographic scope of such use, the form of the marks as they were used, and/or the goods on which the marks were used. Such additional information can only be learned through a deposition of these witnesses (assuming they are qualified to testify to such facts and have knowledge of such matters). To the extent Applicant relies on the Declarants to establish the Applicant's trade channels, Opposer is entitled to cross-examine. For example, Shaver claims that the fraternity and sorority products are sold to members or as gifts for members. D.E. 7 at page 10, Declarations of Smiley, Miraglia, and Wampler at ¶6. Applicant also relies on the declarations to broadly describe a "typical" consumer and condition of sale. Opposer is entitled, through cross-examination, to question the basis for what the Declarants believe makes a sale or use "typical" or whether the members of Greek letter organizations are sophisticated when purchasing items.

#### **b) Channels of Trade**

Applicant claims that its channels of trade and target consumers are limited. See D.E. 7, pages 10-11. Applicant supports this through the testimony of the Declarants, but provides no one

specifically from Applicant's own organization to provide information regarding Applicant's channels of trade. Opposer is entitled to discover the Applicant's products and market channels by deposing a representative of Applicant and obtaining responses to Interrogatories Nos. 2, 13, 15, and 20. This factor clearly warrants discovery because the responses may raise genuine disputes of material facts.

**c) Applicant's Consumers/Sophistication of Applicant's Consumers**

In support of its contention of a "niche market" geared to specific consumers, Applicant relies upon the statement of various third party Declarants. D.E. 7 at pages 10-11. It is clear that discovery is required on this point. Opposer has not been able to cross-examine the Declarants with regard to the foundation of their statements.

Further, Applicant has not responded to Interrogatories on this point. Opposer sought discovery specifically related to the identity and sophistication of Opposer's consumers. *See* Gelber Decl. at ¶ 6, Exhibit 1 (Interrogatory Nos. 17 and 18). Opposer further sought to depose Applicant's representative and the Declarants with regard to these points. The disclosure of this information and deposition of Applicant and the Declarants regarding the demographics of Applicant's consumers is required in order to test the veracity and reliability of Applicant's claims.

**d) Third Party Use**

Applicant relies upon the Smiley and Wampler declarations to claim that third parties have used Omega (either Greek letter or word marks) as early as 1865. *See* D.E. 7 at page 8. Opposer is entitled to know how these declarants could know this information and has the right to cross-examine declarants as to the basis for any statements of this type, and to learn why they may believe this information to be true. Furthermore, Opposer should be permitted to cross-examine the Declarants to determine whether the alleged use is continuous, the geographic scope

of such use, the form of the marks as they were used, and/or the goods used in association with the marks. Such additional information can only be learned through a deposition of these witnesses (assuming they are qualified to testify to such facts and have knowledge of such matters).

**e) Marketing and Advertisement**

Applicant contends that its goods are targeted and sold to a “niche market” consisting of fraternities and sororities. D.E. 7 at 10-11. Marketing is an important element to be considered within the context of *DuPont*’s likelihood of confusion analysis and discovery is required on this point. Opposer’s discovery requests specifically seek information and documents regarding the marketing of Applicant’s goods and services under Applicant’s marks. *See* Gelber Decl. at ¶ 6, Exhibit 1 (Interrogatories 9, 19). Applicant’s responses to these discovery requests regarding marketing are necessary to fully analyze all the *DuPont* factors and respond to Applicant’s Motion for Summary Judgment.

**f) Extent of Likelihood of Confusion and Actual Confusion**

In its Motion for Summary Judgment, Applicant claims that Applicant and Opposer have “coexisted for over 30 years, since 1983” and “neither is aware of a single instance of confusion or consumer association.” D.E. 7 at pages 5-6, 11-12. Accordingly, Opposer seeks discovery regarding this point through a deposition of Applicant’s representative and a response to Interrogatories 4, 8, 25 and 26. Gelber Decl. at ¶ 6, Exhibit 1. Opposer seeks information regarding the duration and extent of coexistence, the extent of goods on which Applicant uses the marks, as well as information pertaining to instances of actual confusion, which are clearly relevant and material given the arguments and assertions raised by Applicant.

**g) All of Opposer's Discovery Requests Relate to the Relevant *DuPont* Factors**

All of the discovery requests (interrogatories, subpoenas, and notice of deposition) propounded by Opposer seek discovery relating to the *DuPont* likelihood of confusion factors. Depending on the circumstances of a case, any single factor can play a dominant role. *See DuPont*, 476 F.2d at 1361-1362. Opposer is entitled to discovery on all of the factors as they may raise triable issues of fact.

Discovery regarding these factors digs below the surface and may unearth facts that tend to support a contrary conclusion regarding Applicant's self-serving claims and statements that there is no likelihood of confusion. *See Doe v. Abington Friends School*, 480 F.3d 252, 259 (3d Cir. 2007). Therefore, the Board should grant Applicant's Rule 56(d) Motion and Opposer should respond to all discovery requests propounded on July 3, 2013 as all requests that relate to the *DuPont* factors on the likelihood of confusion and Opposer's standing.

**3. Discovery Has Not and Could Not Have Been Obtained Earlier**

As explained above in the Factual Background, Opposer was diligent in seeking discovery. Opposer served its First Set of Interrogatories on June 2, 2014. Decl. Gelber at ¶ 6, Exhibit 1. Applicant responded with a general objection to the interrogatories, arguing that the total number of interrogatories (including sub-parts) exceeded seventy-five (75) and therefore Applicant did not have to provide responses pursuant to TBMP § 405.03. Applicant's position that Opposer's interrogatories exceeded seventy-five (75) is entirely unfounded; Applicant had no excuse not to have properly responded to the interrogatories. Opposer served upon Applicant a total of twenty-nine (29) interrogatories. *Id.* It is unfathomable to Opposer how Applicant counted seventy-five (75) interrogatories. The interrogatories are straight-forward, non-compound, and without sub-parts. *Id.* Therefore, Applicant's objection is meritless and Applicant should have timely

responded. As a result of Applicant's baseless objection and withholding of responses to Opposer's interrogatories, Opposer has been unable to obtain the information it seeks.

The Declarations were provided to Opposer on July 25, 2014. Opposer timely sought to depose the Declarants, and inquired whether they would be willing appear voluntarily. Applicant's counsel refused to respond, requiring the issuance of Subpoenas.

The subpoenas, a notice of deposition for Applicant and the Interrogatories were outstanding at the time of Applicant's filing of the Motion for Summary Judgment. Opposer's discovery was not unduly delayed. Applicant's Motion for Summary Judgment is an inappropriate attempt to avoid responding to necessary discovery.



## CONCLUSION

In view of the foregoing and Applicant's Rule 56(d) declaration, Opposer is entitled under Fed. R. Civ. P. 56(d) to conduct discovery in reference to Applicant's Motion and seeks the deposition of Applicant's Rule 30(b)(6) witness and the Declarants and responses to Interrogatory Nos. 2-4, 8, 9, 13, 15, 17-21, 25 and 26 as contained in Exhibit 1. Opposer respectfully requests that the pending Motions be sequenced so as to address the instant Motion first and defer determination of Applicant's Motion for Summary Judgment until Opposer has had an opportunity to obtain necessary discovery.

Respectfully submitted,



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Enclosures: Declaration of Oren Gelber  
Exhibits 1-10

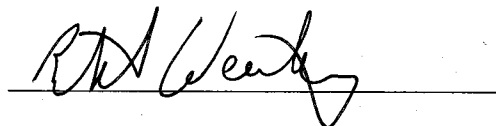
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Dated: October 14, 2014

SHOULD ANY OTHER FEE BE REQUIRED, THE PATENT AND TRADEMARK OFFICE IS HEREBY REQUESTED TO CHARGE SUCH FEE TO OUR DEPOSIT ACCOUNT 03-2465.

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING FILED ELECTRONICALLY WITH THE UNITED STATES PATENT AND TRADEMARK OFFICE.

Date: October 14, 2014



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**DECLARATION OF OREN GELBER  
IN SUPPORT OF OPPOSER'S RULE 56(D) MOTION**

I, Oren Gelber, declare and state, under penalty of perjury, as follows:

1. I am an attorney at Collen IP, attorneys for Omega S.A. (Omega AG) (Omega Ltd.) ("Opposer") in the above referenced action. The facts set forth in this declaration are personally known to me and I have first-hand knowledge thereof. If called as a witness, I could and would competently testify to all the following facts that are within my personal knowledge.

2. On January 13, 2014, Opposer instituted four Oppositions against Applicant Alpha Omega Epsilon, Inc.'s ("Applicant") trademark applications for the marks, AΩE, ALPHA OMEGA EPSILON and ALPHA OMEGA EPSILON & Design. True and correct copies of Opposer's Notices of Opposition are found at D.E. 1 in Opposition No. 91214449; Opposition No. 91214454; Opposition No. 91214452; and Opposition No. 91214453.

3. On February 17, 2014, Applicant filed its Answers to the Notices of Opposition. True and correct copies of Applicant's Answers to the Notices of Opposition are found at D.E. 4 in each of Opposition No. 91214449; Opposition No. 91214454; Opposition No. 91214452; and Opposition No. 91214453.

4. On March 26, 2014, Opposer moved to consolidate these four oppositions with Applicant's consent. A true and correct copy of Opposer's Motion to Consolidate Related Proceedings is found at D.E. 5 in Opposition No. 91214449.

5. The proceedings were consolidated under Opposition No. 91214449 pursuant to the Board's April 1, 2014 Order. A true and correct copy of the Board's April 1, 2014 Order is found at D.E. 6.

6. Opposer served Applicant with its First Set of Interrogatories, First Request for Production of Documents and First Request for Admissions on June 2, 2014. A true and correct copy of Opposer's First Set of Interrogatories, as served upon Applicant, is attached hereto as Exhibit 1.

7. Applicant served Opposer with Applicant's Responses and Objections to Opposer's First Request for Production of Documents and Things, and Applicant's Responses and Objections to Opposer's First Request for Admissions on July 10, 2014. True and correct copies of the certificates of service are attached hereto as Exhibit 2.

8. Applicant served Opposer with its General Objections to Opposer's First Set of Interrogatories on July 10, 2014. A true and correct copy of Applicant's General Objections to Opposer's First Set of Interrogatories is attached hereto as Exhibit 3.

9. On July 21, 2014, Applicant sent Opposer's counsel an email enclosing Applicant's document production bates labeled AOE 0001-0203.

10. On July 25, 2014, Applicant sent Opposer's counsel multiple emails containing supplemental document production. True and correct copies of Applicant's July 25, 2014 emails to Opposer are attached hereto as Exhibit 4.

11. The document production provided by Applicant on July 25, 2014 amounted to over 130 pages of additional production. The July 25, 2014 production included declarations from three individuals, Ms. Wampler, Mr. Smiley and Ms. Miraglia, reportedly associated with Alpha Tau Omega, Alpha Chi Omega and Chi Omega, as well as a declaration from Mr. Shaver of Affinity Marketing Consultants, Applicant's licensee (collectively referred to as the "Declarants") and Internet printouts relating to Alpha Tau Omega, Alpha Chi Omega, and Chi

Omega products, printouts from third party websites regarding Omega's products and copies of third party U.S. Trademark Registrations.

12. On August 28, 2014, Opposer sent an email to Applicant's counsel to advise of its intent to depose Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley and inquiring whether these witnesses would appear for such depositions willingly. A true and correct copy of Opposer's email of August 28, 2014 is attached hereto as Exhibit 5.

13. Applicant's counsel never responded to Opposer's August 28, 2014 email.

14. On September 3, 2014, Opposer issued a Rule 30(b)(6) Notice of Deposition to Applicant. The Notice was served by email and U.S. mail. A true and correct copy of Opposer's Rule 30(b)(6) Notice of Deposition to Applicant is attached hereto as Exhibit 6.

15. Due to Applicant's failure to respond to Opposer's August 28, 2014 email, Opposer issued Subpoenas pursuant to Rule 45 to each of Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley on September 3, 2014.

16. Opposer was able to successfully serve Ms. Wampler on September 4, 2014, Ms. Miraglia on September 5, 2014, and Mr. Smiley on September 5, 2014, but was unable to personally serve Mr. Shaver as the address provided by Applicant's counsel was a post office box. True and correct copies of the certificates of service for the subpoenas issued to Ms. Wampler, Ms. Miraglia, and Mr. Smiley are attached hereto as Exhibit 7.

17. On September 8, 2014, Opposer's counsel emailed Applicant's counsel to confer regarding dates of availability for the deposition of Applicant pursuant to Rule 30(b)(6) and with regard to the subpoenas issued to Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley. A true and correct copy of Opposer's September 8, 2014 email is attached as Exhibit 8.

18. Applicant's counsel responded by return email on September 8, 2014 acknowledging service of the Notice of Deposition and Subpoenas, and suggesting a conference between the parties to discuss dates and times of availability for the Applicant's deponent and the Declarants. A true and correct copy of Applicant's September 8, 2014 email is attached as Exhibit 9.

19. On September 9, 2014, Applicant's counsel sent Opposer's counsel an email enclosing a courtesy copy of Applicant's Motion for Summary Judgment which was filed September 9, 2014. A true and correct copy of Applicant's September 9, 2014 email is attached as Exhibit 10.

20. Applicant's Motion seeks summary judgment on Opposer's claim of a likelihood of confusion and dilution. D.E. 7.

21. Applicant's Motion contains statements and information which are not public information but are within the control of the Applicant and/or its Declarants.

22. Applicant's Motion contains statements with respect to Applicant's use of the ALPHA OMEGA EPSILON, ALPHA OMEGA EPSILON & Design, and AΩE marks.

23. Applicant's Motion contains statements with respect to other third party use of marks incorporating the term OMEGA and/or the symbol Ω.

24. Applicant's Motion (D.E. 7) contains statements with respect to Applicant's channels of trade.

25. Applicant's Motion (D.E. 7) contains statements with respect to Applicant's consumers.

26. Applicant's Motion (D.E. 7) contains statements with respect to other fraternities and sororities' channels of trade

27. Applicant's Motion (D.E. 7) contains statements with respect to other fraternities and sororities' consumers.

28. The mere fact that Applicant relies on statements relating to material within its control (such as Applicant's use of the mark, consumers, and channels of trade) (collectively, "Applicant's Statements") and material within the Declarants' control (third party use, fraternity and sorority channels of trade and consumers) in its Motion indicates that the facts are essential and that Opposer is entitled to discovery as outlined in the accompanying Rule 56(d) Motion.

29. Opposer requires discovery, to know if there are genuine issues of material fact with respect to Applicant's statements about its products. Opposer may have been able to oppose Applicant's Motion if Applicant would have provided discovery responses and produced its witness and the Declarants for depositions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed October 14, 2014 at Ossining, New York.

A handwritten signature in black ink that reads "Oren Gelber". The signature is written in a cursive, slightly slanted style.

Oren Gelber

# Exhibit 1



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: AΩE

Opp. No.: 91214449 (Parent)

Serial No.: 85855823

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: ALPHA OMEGA EPSILON

Opp. No.: 91214454 (Child)

Serial No.: 85855839

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: ALPHA OMEGA EPSILON &  
Design

Opp. No.: 91214452 (Child)

Serial No.: 85857062

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: ALPHA OMEGA EPSILON

Opp. No.: 91214453 (Child)

Serial No.: 85857065

### **OPPOSER'S FIRST SET OF INTERROGATORIES**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice for the United States Patent and Trademark Office, Opposer Omega S.A. (Omega AG) (Omega Ltd.) (hereafter, "Opposer") hereby requests that Applicant Alpha Omega Epsilon, Inc. ("Applicant") respond under oath or by affirmation to the following Interrogatories within thirty (30) days after service of these requests. These Interrogatories shall be deemed continuing and Applicant is requested to serve upon Opposer, in the form of supplementary Answers, any additional information requested herein that may be known to Applicant after the date of its Answers to these Interrogatories.

### **INSTRUCTIONS AND DEFINITIONS**

The following definitions and instructions are applicable to Opposer's First Set of Interrogatories, Opposer's First Request for Production of Document and Opposer's First Request for Admissions:

- A. "Opposer" means the named Opposer in this action, Omega S.A. (Omega AG) (Omega Ltd.), including its divisions, departments, subsidiaries, parents, partners, joint venture partners, officers, directors, owners, agents, employees, accountants, attorneys, any predecessor or successor in interest thereof, and all other persons acting on behalf of or for the benefit of Omega S.A. (Omega AG) (Omega Ltd.).
- B. "Applicant" or "you" shall mean the named Applicant, Alpha Omega Epsilon, Inc., including all partners, joint venture partners, agents, employees, accountants, attorneys, any predecessor or successor in interest thereof, and all other persons acting on behalf of or for the benefit Alpha Phi Omega.
- C. The term "Opposer's Marks" means the trademarks identified in the following U.S. trademark registrations:

OMEGA (AND DESIGN)	REG. NO.	25,036
OMEGA	REG. NO.	566,370
OMEGA (AND DESIGN)	REG. NO.	577,415

OMEGA (AND DESIGN) REG. NO. 578,041

OMEGA (AND DESIGN) REG. NO. 3,318,408

OMEGA (AND DESIGN) REG. NO. 4520281 (SER. NO. 85877912)

D. The term "Applications" means United States Trademark Application Serial Nos. 85855823, 85855839, 85857062 and 85857065.

E. The term "Applicant's Marks" means the trademark identified in United States Trademark Application Serial Nos. 85855823, 85855839, 85857062 and 85857065.

F. The terms "Goods" and "Products" means the items marketed and distributed or intended to be marketed and distributed by Applicant and/or the services provided.

G. The terms "data", "document" and "documents" means any writing of any kind, in any form or format, including all originals, copies, non-identical copies of all correspondence, papers, books, messages, publications, recordings, literature, letters, email communications, photographs, price lists, brochures, memoranda, notes, reports, drawings, diaries, graphic, aural, mechanical or electronic records, or any information that is stored electronically or otherwise and is capable of being retrieved, and any other writings whether in final or draft form and whether or not such draft was actually used or completed, or any "document" as otherwise described in Federal Rule of Civil Procedure 34 which is in your actual or constructive possession, custody or control.

H. "Person" means any individual, firm, corporation, partnership, proprietorship, cooperative, association, joint venture, organization, governmental body, group of natural persons, or any other entity.

I. The term "identify" or "specify" and "state the identity of" shall mean a complete identification to the full extent known or ascertainable by Applicant, whether or not in possession of Applicant, and whether or not alleged to be privileged, including the following information:

- 1) The present depository or depositories and the name and address of the person or persons having custody of any item to be identified unless the item is a patent, public document or person;
- 2) If the item to be identified is a person, his or her full name, address, job title, and present employers;
- 3) If the item to be identified is a document or paper, its character, title, date, addressee or recipient and author, signatory, or sender;
- 4) If the item to be identified is printed material, its title, author, publication date, volume and relevant page numbers;

- 5) If the identity sought is information about a situation or set of circumstances, all of the facts relating to or relevant to such a situation including the identity of persons with knowledge of such situation and the identity of all documents relating to, referring to, or otherwise pertinent to such a situation.
- 6) If the person to be identified is a corporation, or other legal entity, the laws under which it is organized, and the date of organization.
- J. The term "mark(s)" means and includes trademarks, service marks, trade names, corporation names, and any other symbol or device used to identify the source, affiliation, or identity of any product, service or person.
- K. The term "advertisement" means and includes all communications to third parties fixed in a tangible medium of expression and intended to promote or encourage the purchase or sale of goods or services in the United States.
- L. The term "advertising" means and includes all advertisement and all other communications to third parties intended to promote or encourage the purchase or sale of goods or services in the United States.
- M. The term "media outlet" is defined as any individual printed publication such as a newspaper or magazine; broadcast television or radio station; cable channel; or Internet website.
- N. If in the following Interrogatories, Document Requests and Requests for Admission, privilege is alleged as to information or materials, or if an Interrogatory, Document Request or Request for Admission is otherwise not answered in full, state the specific grounds for not answering in full, and answer said Interrogatory, Document Request or Request for Admission to the extent to which it is not objected, including the identification of all information or material for which privilege may be claimed.
- O. All questions are to be read so as to give the question the broadest possible meaning, so that, for example, when either of the terms "and" or "or" is used, it is to be construed as "and/or". Similarly use of the singular also includes the plural, use of any female pronouns also includes the male, and so forth.
- P. Unless otherwise noted, the terms "sell," "advertise," "market," and "promote" are to be interpreted as encompassing both the present act and the future intended act (e.g., "sell" shall also mean "intend to sell").
- Q. Unless otherwise noted, the geographic scope of these discovery requests is limited to the United States.

### INTERROGATORIES

1. Identify each place of business which Applicant presently maintains in connection with trademark usage or trademark licensing in the United States, and describe the type of business activities in each place of business.
2. Identify and describe each Product Applicant sells under Applicant's Marks.
3. For each Product identified in response to Interrogatory No. 2, above, identify the earliest date susceptible to proof when Applicant made such sales of that Product in the United States.
4. Identify the date that Applicant first used Applicant's Marks in commerce in the United States.
5. Identify each person having knowledge of the dates and circumstances surrounding Applicant's first use and/or alleged trademark use of Applicant's Marks in connection with each Product identified in response to Interrogatory No. 2.
6. Identify three individuals most knowledgeable about the nature of the Applicant's business including the advertising, marketing, manufacturing, sales and/or licensing of Products bearing Applicant's Marks.
7. Identify each person having knowledge of the dates and/or circumstances surrounding Applicant's creation, adoption, and/or acquisition of Applicant's Marks.
8. For each Product identified by Applicant in response to Interrogatory No. 2 as being sold under Applicant's Marks, set forth the amount of sales in dollars in the United States for the past ten years, broken down on a yearly basis.
9. Identify the total amount of marketing and/or advertising expenditures for Products bearing Applicant's Marks in the United States incurred by Applicant over the past ten years.

10. Describe in detail the reasons for the selection, adoption or creation of Applicant's Marks, including any connotations or meanings underlying or intended to be conveyed by Applicant's Marks.
11. Explain the significance of the term "OMEGA" or symbol "Ω" to Applicant or Applicant's Marks.
12. Identify any uses of Applicant's Marks in which the OMEGA portion of Applicant's Marks is emphasized, isolated or otherwise distinguished from the other elements of Applicant's Marks.
13. Describe in detail the channels of trade through which Applicant's Products under the Applicant's Marks are sold.
14. Identify all third party uses, through license agreements or otherwise, of Applicant's Marks in the United States of which Applicant is aware, including but not limited to uses of Applicant's Marks in the singular, plural, or uses in combination with other words, phrases or designs.
15. Identify all outlets through which third parties sell Products under Applicant's Marks.
16. Identify any assignment, license, royalty or other permitted use agreements with respect to any Products bearing Applicant's Marks.
17. Identify the target market and target consumers to whom Products bearing Applicant's Marks are sold.
18. Indicate the price range for each Product Applicant sells under Applicant's Marks.

19. Identify the specific media outlets through which Applicant advertises Products bearing Applicant's Marks in the United States.

20. Identify any websites through which Applicant currently advertises or sells Products bearing Applicant's Marks.

21. Identify, as precisely as you can, the date on which Applicant first became aware of Opposer's Marks, and describe how Applicant first became aware of them.

22. Identify any other marks incorporating the term "OMEGA" or symbol "Ω" which Applicants have used in connection with the sale, advertisement, or promotion of goods or services.

23. For each mark identified in response to the preceding Interrogatory, identify the products and services sold, advertised and/or marketed by Applicant under that mark.

24. Identify all applications filed by, or on behalf of, Applicant for federal or state registration of a mark incorporating the term "OMEGA" or symbol "Ω".

25. Identify all other uses by Applicant of term "OMEGA", the symbol "Ω", and/or Applicant's Marks, alone or in combination with other elements.

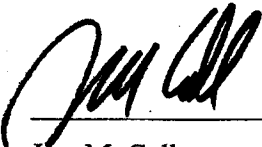
26. Identify any communication or instance where a person has contacted or communicated with Applicant believing that Applicant or Products sold under Applicant's Marks are related to, sponsored by, affiliated with, or controlled by Opposer.

27. State whether Applicant has conducted, caused to be conducted or obtained any trademark search, survey, poll, investigation, consumer perception study, market research study, focus group study or other study relating to any issue in this proceeding, including without limitation, whether any likelihood of confusion may exist between Opposer's Marks and Applicant's Mark prior to the adoption and use of Applicant's Mark.

28. Identify the results and contents of any searches as described in the answer to the preceding Interrogatory.

29. Identify all persons who have participated in any way in the preparation of the answer or responses to these Interrogatories. If more than one individual is identified, state specifically, with reference to Interrogatory numbers, the areas of participation of each such person.

Respectfully Submitted,

By: 

Jess M. Collen  
Thomas P. Gulick  
Oren Gelber  
COLLEN *IP*  
THE HOLYOKE-MANHATTAN BUILDING  
80 South Highland Avenue  
Ossining, NY 10562  
(914) 941-5668 Tel.  
(914) 941-6091 Fax  
*Counsel for Opposer Omega SA (Omega AG)*  
*(Omega Ltd.)*

Date: June 2, 2014



**CERTIFICATE OF SERVICE**

I, Troy L. Jordan, hereby certify that on June 2nd, 2014, I caused true and correct copies of "Opposer's First Set of Interrogatories", "Opposer's First Requests for the Production of Documents and Things", and "Opposer's First Set of Requests for Admission" to be served upon Applicant's Attorney of Record at the following addresses:

Jack A. Wheat  
Stites & Harbison PLLC  
400 W Market Street, Suite 1800  
Louisville, KY 40202-3352

Via first-class mail, postage pre-paid.

Said service having taken place this 2nd day of June, 2014

A handwritten signature in cursive script, reading "Troy L. Jordan", is written over a horizontal line.

## Exhibit 2

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OMEGA, S.A. (OMEGA AG)  
(OMEGA LTD.),

OPPOSER,

V.

ALPHA OMEGA EPSILON, INC.

APPLICANT.

Opposition Nos. 91214449 (Parent)  
91214452  
91214453  
91214454

Serial Nos. 85/855823  
85/857062  
85/857065  
85/855839

**APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF REQUESTS FOR THE  
PRODUCTION OF DOCUMENTS AND THINGS**

Comes the Applicant, Alpha Omega Epsilon, Inc., by counsel, and for its response to Opposer's First Set of Requests for the Production of Documents and Things, Applicant submits as follows:

**DOCUMENTS TO BE PRODUCED**

**REQUEST NO. 1:** All documents which refer to, relate to, or evidence the first use in interstate commerce of Applicant's Marks by Applicant.

**RESPONSE:** Applicant's name, ALPHA OMEGA EPSILON, its Greek letter insignia, AΩE, and its coat-of-arms insignia were adopted back in the early 1980s by the founders of the Alpha Omega Epsilon Sorority. Applicant is unaware what, if any documentation may be reasonably available to it "which refer to, relate to, or evidence *the first use* in interstate commerce of Applicant's Marks by Applicant" (emphasis added). Applicant will produce the reasonably available items reflecting its early use of the marks.

**REQUEST NO. 2:** Documents evidencing any corporations, companies, partnerships, joint ventures or like organizations, registered or unregistered, through which Applicant sells, advertises and/or markets Products bearing Applicant's Marks.

RECVD

DKT 1

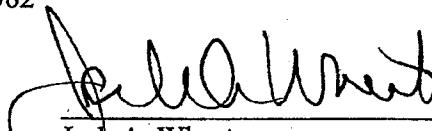
DKT 2

7/14/14

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the forgoing has been served on counsel  
for Opposer by mailing said copy this 10th day of July, 2014, via First Class Mail, postage  
prepaid, to:

Jess M. Collen  
Thomas P. Gulick  
Oren Gelber  
COLLEN IP  
The Holyoke-Manhattan Building  
80 South Highland Ave.  
Ossining, New York 10562

  
\_\_\_\_\_  
Jack A. Wheat  
*Attorney for Applicant*

AL191:00AL1:980834:1:LOUISVILLE

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OMEGA, S.A. (OMEGA AG)  
(OMEGA LTD.),

OPPOSER,

V.

ALPHA OMEGA EPSILON, INC.

APPLICANT.

Opposition Nos. 91214449 (Parent)  
91214452  
91214453  
91214454

Serial Nos. 85/855823  
85/857062  
85/857065  
85/855839

**RESPONSES TO OPPOSER'S  
FIRST SET OF REQUESTS FOR ADMISSIONS**

Comes the Applicant, Alpha Omega Epsilon, Inc, by counsel, and for its responses to  
Opposer's First Set of Requests for Admission, states as follows:

**REQUESTS**

**REQUEST NO. 1:** All documents produced by Applicant in response to Opposer's First  
Set of Requests for the Production of Documents and Things in this proceeding are genuine  
pursuant to the Federal Rules of Evidence.

**RESPONSE:** Although applicant should be in a position to admit that some documents  
are "genuine," there might be others that it is not in a position to so admit. Accordingly,  
Applicant objects to this request because it does not separately identify the documents as  
required by the rules and regulations relating to Requests for Admissions.

**REQUEST NO. 2:** All documents produced by Applicant in response to Opposer's First  
Set of Requests for the Production of Documents and Things in this proceeding are part of the  
business records of Applicant kept in the normal course of Applicant's business.

**RESPONSE:** Denied.

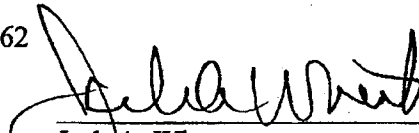
RECVD  
DKT 1  
DKT 2

7/14/14

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the forgoing has been served on counsel for Opposer by mailing said copy this 10th day of July, 2014, via First Class Mail, postage prepaid, to:

Jess M. Collen  
Thomas P. Gulick  
Oren Gelber  
COLLEN IP  
The Holyoke-Manhattan Building  
80 South Highland Ave.  
Ossining, New York 10562

  
\_\_\_\_\_  
Jack A. Wheat  
*Attorney for Applicant*

980596:1:LOUISVILLE

# Exhibit 3

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OMEGA, S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposition Nos. 91214449 (Parent)  
91214452  
91214453  
91214454

OPPOSER,

V.

Serial Nos. 85/855823  
85/857062  
85/857065  
85/855839

ALPHA OMEGA EPSILON, INC.

APPLICANT.

**GENERAL OBJECTION TO OPPOSER'S  
FIRST SET OF INTERROGATORIES**

Comes the Applicant, Alpha Omega Epsilon, Inc, by counsel, and for its General  
Objection to Opposer's First Set of Interrogatories, states as follows:

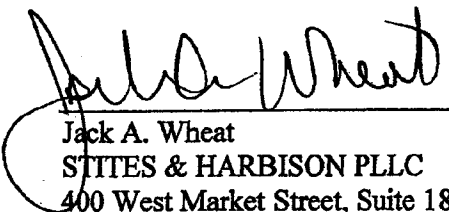
1. As provided by TBMP § 405.03(a), "[t]he total number of interrogatories which a party may serve . . . may not exceed 75, counting sub-parts" absent approval of the Board.
2. In scrutinizing Opposer's Interrogatories consistent with the guidelines set forth by the Board in TBMP § 405.03(d), including counting sub-parts as separate Interrogatories, it is apparent Opposer has propounded well in excess of 75 Interrogatories.
3. Accordingly, rather than answer the first 75 and object to the remainder, Applicant hereby generally objects to the excessive number of Interrogatories as prescribed by TBMP § 405.03(e).

RECVD

DKT 1

DKT 2



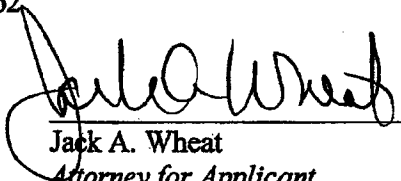
  
\_\_\_\_\_  
Jack A. Wheat  
STITES & HARBISON PLLC  
400 West Market Street, Suite 1800  
Louisville, Kentucky 40202-3352  
Telephone: (502) 587-3400

*Counsel for Alpha Omega Epsilon*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the forgoing has been served on counsel for Opposer by mailing said copy this 10th day of July, 2014, via First Class Mail, postage prepaid, to:

Jess M. Collen  
Thomas P. Gulick  
Oren Gelber  
COLLEN IP  
The Holyoke-Manhattan Building  
80 South Highland Ave.  
Ossining, New York 10562

  
\_\_\_\_\_  
Jack A. Wheat  
*Attorney for Applicant*

984095:1:LOUISVILLE

# Exhibit 4

---

**From:** JWheat@stites.com  
**To:** Oren Gelber  
**Sent:** 7/25/2014 3:53PM  
**Subject:** Supplemental Production

Oren, Attached you will find a supplemental production applicable to Omega v. Alpha Omega Epsilon as well as Omega v. Alpha Phi Omega including documents labeled Misc001 through Misc018, AXO021 and AXO022, a written statement from Carol Miraglia, the Chief Financial Officer of Chi Omega with attachments Bates numbered ChiO0001 through ChiO030 and a document labeled ChiO031.

Jack A. Wheat  
Partner/Member  
Direct: 502-681-0323  
Mobile: 502-599-9520  
Fax: 502-779-8273  
jwheat@stites.com

STITES&HARBISON PLLC  
400 West Market Street, Suite 1800, Louisville, KY 40202-3352  
About Stites & Harbison | Bio | V-Card

NOTICE: This message is intended only for the addressee and may contain information that is privileged, confidential and/or attorney work product. If you are not the intended recipient, do not read, copy, retain or forward this message or any attachment. Please notify the sender immediately and delete all copies of the message and any attachments. Neither the transmission of this message or any attachment, nor any error in transmission, constitutes a waiver of any applicable legal privilege. To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

---

**From:** JWheat@stites.com  
**To:** Oren Gelber  
**Sent:** 7/25/2014 11:04AM  
**Subject:** Supplemental Production

Oren, Attached you will find a supplemental production applicable to Omega v. Alpha Omega Epsilon as well as Omega v. Alpha Phi Omega including a written statement from Wynn Smiley, the Chief Executive Officer of Alpha Tau Omega with attachments Bates numbered ATO0001 through ATO018 and a written statement from Janine Wampler, the Marketing and Communications Director of Alpha Chi Omega with attachments Bates numbered AXO0001 through AXO020 .

Jack A. Wheat  
Partner/Member  
Direct: 502-681-0323  
Mobile: 502-599-9520  
Fax: 502-779-8273  
jwheat@stites.com

STITES&HARBISON PLLC  
400 West Market Street, Suite 1800, Louisville, KY 40202-3352  
About Stites & Harbison | Bio | V-Card

NOTICE: This message is intended only for the addressee and may contain information that is privileged, confidential and/or attorney work product. If you are not the intended recipient, do not read, copy, retain or forward this message or any attachment. Please notify the sender immediately and delete all copies of the message and any attachments. Neither the transmission of this message or any attachment, nor any error in transmission, constitutes a waiver of any applicable legal privilege. To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

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**From:** JWheat@stites.com  
**To:** Oren Gelber  
**Sent:** 7/25/2014 4:19PM  
**Subject:** Supplemental Production

Oren, Attached you will find a supplemental production applicable to Omega v. Alpha Omega Epsilon as well as Omega v. Alpha Phi Omega, namely statement from Daniel Shaver, the President of Affinity Marketing Consultants, with attachments Bates numbered AMC0001 through AMC033.

Jack A. Wheat  
Partner/Member  
Direct: 502-681-0323  
Mobile: 502-599-9520  
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# Exhibit 5

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**From:** Oren Gelber  
**To:** 'Wheat, Jack'  
**Cc:** Thomas Gulick  
**Sent:** 8/28/2014 9:29AM  
**Subject:** RE: P890-Omega S.A. v. Alpha Omega Epsilon

Jack,

In light of your desire to proceed, we write to advise that we will be seeking to depose Mr. Shaver, Ms. Wampler, Ms. Miraglia, and Mr. Smiley.

We write to inquire whether these witnesses will appear willingly in response to a Notice of Deposition. If not, please advise accordingly and we will proceed with issuing subpoenas for these witnesses.

I look forward to hearing from you at your earliest opportunity.

Sincerely,

Oren

Ms. Oren Gelber

Associate

COLLEN IP

INTELLECTUAL PROPERTY LAW, P.C.

The Holyoke-Manhattan Building

80 South Highland Avenue | Ossining-on-Hudson, Westchester County, New York 10562 | U.S.A.

Tel: +1-914-941-5668 | Fax: +1-914-941-6091 | [www.collenip.com](http://www.collenip.com)

Collen IP BRANDS IN SOCIAL MEDIA BLOG - <http://www.brandsinsm.com>

# Exhibit 6



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: AΩE

Opp. No.: 91214449 (Parent)

Serial No.: 85855823

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: ALPHA OMEGA EPSILON

Opp. No.: 91214454 (Child)

Serial No.: 85855839

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: ALPHA OMEGA EPSILON &  
Design

Opp. No.: 91214452 (Child)

Serial No.: 85857062

OMEGA S.A. (OMEGA AG)  
(OMEGA LTD.),

Opposer,

v.

ALPHA OMEGA EPSILON, INC.,  
Applicant.

Mark: ALPHA OMEGA EPSILON

Opp. No.: 91214453 (Child)

Serial No.: 85857065

**NOTICE OF RULE 30(b)(6) DEPOSITION**  
**UPON ORAL EXAM**

TO: Alpha Omega Epsilon

C/O: Jack A. Wheat  
Stites & Harbison PLLC  
400 W Market Street, Suite 1800  
Louisville, KY 40202-3352

PLEASE TAKE NOTICE that in the above-captioned opposition proceedings, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and TBMP § 404.01, on Wednesday, September 17, 2014 at 9:30 am at the offices of Collen IP, 80 South Highland Avenue, Ossining, NY 10562, or another mutually convenient location, Opposer will take the deposition of Applicant Alpha Omega Epsilon through one or more of its officers, directors, or managing agents, or other persons designated by Applicant, with knowledge of the following topics:

1. All products and services sold or offered for sale in the United States by Applicant Alpha Phi Omega ("Applicant") in conjunction with Applicant's ALPHA OMEGA EPSILON, AQE and ALPHA OMEGA EPSILON & Design trademarks ("Applicant's Marks").
2. The circumstances surrounding the adoption and first use of Applicant's Marks in the United States.
3. The adoption and first use of Applicant's Marks in the United States.
4. Use of Applicant's Marks in the United States since their adoption, as well as any periods of non-use, and any intended future uses of the mark.
5. Applicant's advertising, marketing, manufacturing and product development activities and plans for Applicant's Marks in the United States.

6. The channels of trade through which Applicant sells and/or distributes goods in conjunction with Applicant's Marks in the United States.
7. The customers and distributors to whom Applicant sells goods in conjunction with Applicant's Marks in the United States.
8. Applicant's customers and distributors in the United States.
9. Applicant's contacts with its customers and distributors in the United States.
10. The manner in which Applicant distributes products bearing Applicant's Marks in the United States.
11. The dollar amounts expended by Applicant in developing and promoting Applicant's Marks, either in alone or in combination with any other term, design, or designation in the United States.
12. Applicant's annual U.S. sales of goods bearing Applicant's Marks for the past five years, in U.S. dollars.
13. Applicant's annual U.S. sales of goods bearing Applicant's Marks for the past five years, in units.
14. Past or present confusion or evidence of confusion between Applicant's Marks and other marks in the United States.
15. Licenses or agreements with any third parties in the United States related to Applicant's Marks.
16. Applicant's plans to market, distribute, sell, or provide products using Applicant's Marks in the United States.
17. Applicant's other OMEGA or  $\Omega$  marks.
18. The commercial impression and pronunciation of Applicant's Marks.

19. The fame and goodwill associated with Applicant's Marks.
20. Applicant's enforcement efforts with respect to Applicant's Marks.
21. All documents produced by Applicant in response to Opposer's First Set of Interrogatories and Request for Document Production.
22. All information provided by Applicant in its responses to Opposer's First Set of Interrogatories.
23. The factual bases for Applicant's admissions and denials provided in response to Opposer's First Set of Requests for Admissions.

Please take further notice that pursuant to Rule 30(b)(3) of the Federal Rules of Civil Procedure the deposition will be recorded by one or more of the following means: stenographic, sound and/or visual means.

The deposition will continue day to day until completed. You are invited to attend and cross-examine.

Respectfully Submitted,

By: Oren Gelber

Jess M. Collen  
Thomas P. Gulick  
Oren Gelber  
COLLEN IP  
THE HOLYOKE-MANHATTAN BUILDING  
80 South Highland Avenue  
Ossining, NY 10562  
(914) 941-5668 Tel.  
(914) 941-6091 Fax  
*Counsel for Opposer*

Dated: September 3, 2014

**CERTIFICATE OF SERVICE**

I, Meaghan Machcinski, hereby certify that a true and correct copy of the foregoing Notice of Rule 30(b)(6) Deposition Upon Oral Examination has been served by First Class Mail, Postage Prepaid, on September 3, 2014 upon Applicant's Attorney of Record at the following address:

Jack A. Wheat  
Stites & Harbison PLLC  
400 W Market Street, Suite 1800  
Louisville, KY 40202-3352  
jwheat@stites.com

A handwritten signature in black ink, appearing to read "Jack A. Wheat", is written over a horizontal line.

# Exhibit 7

**AFFIDAVIT OF SERVICE**

**UNITED STATES DISTRICT COURT  
Southern District of Indiana**

Case Number: TTAB OPP. 91214449

Plaintiff:

**Omega S.A. (Omega AG) (Omega Ltd.)**

vs.

Defendant:

**Alpha Omega Epsilon, Inc.**

Received by JS Legal Services.com on the 4th day of September, 2014 at 2:53 pm to be served on **Janine Wampler of Alpha Chi Omega Fraternity, Inc., 5939 Castle Creek Parkway North Drive, Indianapolis, IN 46250.**

I, Pamela J. Conley, being duly sworn, depose and say that on the 5th day of September, 2014 at 1:14 pm, I:

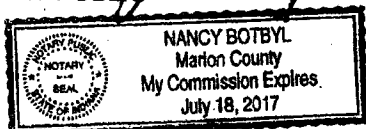
**Individually Served** the within named person with a true copy of the Subpoena to Testify at a Deposition in a Civil Action, Witness Fee (\$40) at the aforementioned address.

**Description of Person Served:** Age: 47, Sex: F, Race/Skin Color: Cauc, Height: 5'8", Weight: 180, Hair: Brown, Glasses: N

I certify that I am over the age of 18, have no interest in the above action and have proper authority in the jurisdiction in which service was made. I declare that the facts set forth in the foregoing Affidavit of Service are true and correct.

Subscribed and Sworn to before me on the 5th day of September, 2014 by the affiant who is personally known to me.

  
NOTARY PUBLIC



  
Pamela J. Conley  
Process Server

JS Legal Services.com  
1375 Broadway, Ste. 600  
New York, NY 10018  
(212) 760-2300

Our Job Serial Number: CRT-2014004777  
Ref: Omega Valpha

**AFFIDAVIT OF SERVICE**

**UNITED STATES DISTRICT COURT  
Southern District of Indiana**

Case Number: TTAB OPP. 91214449

Plaintiff:

**Omega S.A. (Omega AG) (Omega Ltd.)**

vs.

Defendant:

**Alpha Omega Epsilon, Inc.**

Received by JS Legal Services.com on the 4th day of September, 2014 at 2:53 pm to be served on **Wynn Smiley of Alpha Tau Omega Fraternity, Inc., One N. Pennsylvania Street, 12th Floor, Indianapolis, IN 46204.**

I, Pamela J. Conley, being duly sworn, depose and say that on the **8th day of September, 2014 at 8:56 am, I:**

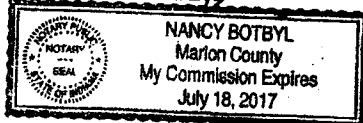
**Individually Served** the within named person with a true copy of the Subpoena to Testify at a Deposition in a Civil Action, Witness Fee (\$40) at the aforementioned address.

**Description of Person Served:** Age: 60, Sex: M, Race/Skin Color: Cauc, Height: 5'10", Weight: 180, Hair: Gray, Glasses: N

I certify that I am over the age of 18, have no interest in the above action and have proper authority in the jurisdiction in which service was made. I declare that the facts set forth in the foregoing Affidavit of Service are true and correct.

Subscribed and Sworn to before me on the 8th day of September, 2014 by the affiant who is personally known to me.

*Nancy Botbyl*  
NOTARY PUBLIC



*Pamela J. Conley*

**Pamela J. Conley**  
Process Server

**JS Legal Services.com**  
1375 Broadway, Ste. 600  
New York, NY 10018  
(212) 760-2300

Our Job Serial Number: CRT-2014004776  
Ref: Omega Valpha

226 /oca-10



Civil Action No. TTAB Opp. No. 91214449

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for (name of individual and title, if any) Carol Micaglia  
on (date) 9/5/14

☒ I served the subpoena by delivering a copy to the named individual as follows: personal service  
@ 3395 Players Club Prng on (date) 9/5/14 @ 1:46pm

☐ I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_

No fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: 9/5/14

Carla Lankford  
Server's signature  
Carla Lankford, PRS  
Printed name and title

5240 Mendenhall Park Pl  
Server's address  
Memphis, TN 38115

Additional information regarding attempted service, etc.: \_\_\_\_\_

3251 PS 9-12

# Exhibit 8

---

**From:** Oren Gelber  
**To:** Wheat, Jack (JWheat@stites.com)  
**Cc:** Thomas Gulick  
**Sent:** 9/08/2014 5:13PM  
**Subject:** RE: P890- Omega SA v Alpha Omega Epsilon, Inc.

Dear Jack,

I write to follow up with you regarding my email of September 3, 2014.

Please advise as to your client's availability for the noticed Deposition. If there are schedule conflicts, we can attempt to accommodate, perhaps by agreeing to extend discovery by 30 or 60 days.

I also note that you did not respond to our inquiry of August 28, 2014 as to whether Ms. Miraglia, Ms. Wampler, Mr. Smiley and Mr. Shaver would appear willingly for third party depositions. As a result, we have issued subpoenas for Ms. Miraglia, Ms. Wampler, Mr. Smiley and Mr. Shaver. Courtesy copies of the subpoenas are attached. Official copies of the subpoenas including signatures and proof of service will follow shortly.

Please note that Ms. Miraglia, Ms. Wampler and Mr. Smiley have been served. We expect that Mr. Shaver will be served tomorrow.

We look forward to hearing from you.

Sincerely,

Oren

Ms. Oren Gelber

Associate

COLLEN IP

# Exhibit 9

---

**From:** JWheat@stites.com  
**To:** Oren Gelber  
**Sent:** 9/08/2014 5:55PM  
**Subject:** RE: P890- Omega SA v Alpha Omega Epsilon, Inc.

Oren, Thanks for this information. Were Notices to take the Miraglia, Wampler, Smiley, and Shaver depositions ever issued? I have not received anything? It's taking 5 to 6 days to get any mail from you. If possible, if you can also email courtesy copies, that would be appreciated.

By the way, I think you remitted inadequate per diem and mileage checks to the subpoenaed witnesses. You may want to check into that.

Regardless, we can work with you on scheduling. I have heard from Ms. Wampler and believe that date may work.

I don't know whether that date works for Smiley.

I do not believe any of the other dates will work.

As for the 30(b)(6), neither the date, nor the location works. Tomorrow, I expect to know when and where the Designee can be available?

Can we talk tomorrow afternoon about dates, and locations. We also need to discuss scope of these depositions. We may be agreeable to extending discovery a week or so.

Since we're going to the trouble and expense of taking all these depositions, I'm thinking about agreeing to allow you to use them in the Alpha Phi Omega proceeding which may moot your motions in that case.

Can we talk tomorrow afternoon. Say when?

Jack A. Wheat  
Partner

# Exhibit 10

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**From:** JWheat@stites.com  
**To:** Oren Gelber; Thomas Gulick  
**Sent:** 9/09/2014 10:50AM  
**Subject:** Alpha Omega Epsilon

Oren & Thomas, Attached you will find a courtesy copy of this organization's Motion for summary Judgment filed late yesterday afternoon. the formal service copy was mailed to you yesterday.

Jack A. Wheat  
Partner  
Direct: 502-681-0323  
Mobile: 502-599-9520  
Fax: 502-779-8273  
jwheat@stites.com

STITES&HARBISON PLLC  
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**CERTIFICATE OF SERVICE**

I, Richard Weinberg, hereby certify that a copy of the foregoing Opposer's Rule 56(d) Motion Seeking Discovery From Applicant was served by First Class U.S. Mail, postage prepaid on this 14th Day of October, 2014 upon

Jack A. Wheat  
Stites & Harbison PLLC  
400 W Market St Ste 1800  
Louisville, KY 40202-3352

A handwritten signature in cursive script, appearing to read "Richard Weinberg", is written over a horizontal line.